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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 667

NATIONAL TRUCK RENTAL COMPANY, INC.,
A MARYLAND CORPORATION
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on October 18, 1956.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported in the Federal Reporter but is printed in the Appendix to this Petition at page 13. The various decisions of the National Labor Relations Board are printed in the Joint Appendix

[1] In the Court of Appeals, the case was entitled *"National Labor Relations Board v. National Truck Rental Company, Inc."*

filed in the Court of Appeals and refiled as a part of the record with this Petition (R. 152, 171-3, 208-210, and 242-250).[2] While the first decision is unreported in the volume of National Labor Relations Board Decisions, the subsequent decisions may be found at 108 NLRB 1349, 110 NLRB 838, and 114 NLRB 106 respectively. All four decisions of the Board are printed in the Appendix to this Petition beginning at page 19.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on October 18, 1956. The Petition of this Petitioner for a rehearing was denied on November 7, 1956, and the Petitioner's Motion for a Stay of Mandate was granted by the Court of Appeals on November 29, 1956 and extended by Order dated December 20, 1956. The jurisdiction of this Court arises under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Two unions filed a joint petition for a representation election under the provisions of Section 9(c) of the National Labor Relations Act, as amended. The National Labor Relations Board received and processed the petition and permitted both unions to appear jointly on the election ballot.

In directing an election, the Board (by its own admission (R. 172)) mistakenly defined the classifications of eligible employees, but there was only one ballot counted as a result of the Board's error. The result of the election could not have been affected by the one ballot which should not have

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[2] As in the Court of Appeals proceedings, all references (R. . . . .) are made to pages of the certified Record, and are found in bold face type in the body of the Joint Appendix and in brackets at the upper outside corner of each page thereof.

been counted. Without any further hearing or any material evidence to support its action, the Board directed a Second Election. In the Second Election there were an equal number of votes cast in favor of and against representation by the two unions, and the unions therefore failed to obtain a majority of the votes cast. Two ballots, one "Yes" ballot and one "No" ballot, had irregular markings upon them outside of the square generally used to mark them. The Board determined that one ballot was valid and the other was invalid, (R. 208) with the result that the unions won by one vote and were certified jointly as the bargaining representative of the employees.

The Court of Appeals determined that the Board had sufficient discretion in administering the National Labor Relations Act to assume that there was "possible confusion" in the First Election justifying the Board in directing the Second Election. The Court of Appeals also determined that the Board's ruling regarding the disputed ballot in the Second Election was supported by evidence, but declined to rule on the legal issue of whether or not the Board was correct in determining that an extraneous marking on a ballot destroys the secrecy of that ballot. The questions presented are as follows:

1.

May a quasi-judicial administrative agency, namely the National Labor Relations Board, exercise its "administrative competence" based solely on suspicion and conjecture in the absence of any "substantial evidence"?

2.

Does the term "secret ballot" as used in Section 9(c)(1) of the National Labor Relations Act, as amended, mean that a voter's choice may not be revealed by him volun-

tarily, or did Congress intend merely that every voter should have the *right* to vote in secrecy and be free from compulsion to reveal his choice?

STATUTES INVOLVED

The pertinent sub-sections of the National Labor Relations Act, as amended (29 U.S.C., Section 159(c)(1) and (3)) are set forth below:

29 U.S.C., Chapter 7, subchapter II, Section 159(c)(1) and (3):

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have

been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

STATEMENT

The Company (Petitioner herein) is a Maryland corporation engaged in the business of leasing automobiles and trucks in the District of Columbia. On November 9, 1953, the International Association of Machinists, AFL, filed a representation petition in the office of the Regional Director of the National Labor Relations Board for the Fifth Region, requesting that an election be held to ascertain whether the employees of the Company wished to be represented jointly by the Machinists and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL. The Teamsters had made no separate demand for recognition, the Company had not declined to recognize the Machinists, and there is no evidence that any employee authorized the Teamsters to act in the matter at any time (R. 20, R. 21).

Despite numerous objections by the Company relating to the falsity of the petition and the deception being practiced upon the employees, (e.g. R. 110, R. 95, R. 36-37) the Board established a so-called appropriate unit combining the mechanics and laborers in the same bargaining group, and the First Election was held on February 19, 1954. Both labor unions appeared on the ballot as a joint bargaining agent.

The Tally of Ballots (R. 155) shows that, of 31 ballots cast in the election, 13 were cast for the Unions, 15 were

cast against the Unions, and 3 ballots were challenged. In its Supplemental Decision of June 15, 1954, the Board properly determined that the three challenged ballots should not be counted; but despite the fact that this determination did not affect the result of the election, and there was no evidence adduced or findings made to indicate the existence of any confusion, the Board directed a new election based solely on the vague conclusion, unsupported by any evidence, that because of "possible confusion", the purposes of the Act would be best served if the election were set aside (R. 172).

Accordingly, the Board conducted a Second Election on July 23, 1954. In this election, there were 24 ballots cast, 12 of which were marked "Yes" in favor of the Unions, and 12 of which were marked "No" against the participating labor organizations (R. 183). The Board agent who conducted the election thereupon, again contrary to the wishes of the employees and to their intent as expressed by the ballots, altered the result of the election by declaring one "No" ballot void, on the ground that it contained a pencil mark outside of the "X" box, which he said could conceivably serve to identify the voter. Counsel for the Company, on the next working day after the election, visited the Regional Office and examined all the ballots in the presence of the Board agent who conducted the election. At that time, counsel found that a "Yes" ballot also had a mark outside of the "X" box, and the Company thereupon filed an objection to the result of the election (R. 187).

In its Second Supplemental Decision and Certification of Representatives handed down by the Board on November 9, 1954, the Board, doing violence to the Stipulation of the parties (R. 229), upheld the action of the Regional Director in voiding the "No" ballot and in failing to void the "Yes" ballot in question, and the Board thereupon certified

the joint petitioners as the bargaining agent for the amended bargaining unit.

The Unions thereupon requested your Petitioner to bargain, and thereafter the Board's Order issued in due course, the enforcement of which was decreed below. The pragmatic basis of this Petition, therefore, is to obtain a determination of whether a bargaining agent can be lawfully certified where it failed to receive a majority of votes cast in either of two successive elections.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia should be reviewed by this Court because it erroneously interprets the National Labor Relations Act, as amended, and is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit, the Sixth Circuit, and the Seventh Circuit and with the decision of this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), which is of paramount importance in all branches of administrative law in the United States. Whether the conflict is one of principle, or is a direct conflict, is not apparent from the opinion of the Court below, because the Court cites no cases whatever in support of its decision on the most important issue of the case, except one prior opinion of its own which was handed down in the course of deciding a case *to the contrary effect. N.L.R.B. v. Capital Transit Co.*, 95 U.S. App. D.C. 310, 221 F. 2d 864 (1955).

The decision below erroneously interprets the "secret ballot" principle embodied in the National Labor Relations Act, this apparently being the first decision on this issue in a Federal Court. On the basis of either one of these two principal grounds, the Court should grant review.

1. *Conflict with Other Courts.* The injustices (as great as they have been) so far perpetrated in the proceedings

below, are negligible when set against the importance of the departure from the settled rules of "substantial evidence" which have been established by the Administrative Procedure Act, the National Labor Relations Act, and the decisions of this Court. In order to understand the nature of the conflict existing between this decision and the decision of the Supreme Court and Circuit Courts, it is necessary to review briefly the facts which the Court of Appeals was called upon to review.

In the First Election in this case, the employees in the bargaining unit voted 15 to 13 against representation by the two petitioning labor organizations. Because of an error of the Board in defining the bargaining unit, one of those 28 votes was cast by a foreman; but regardless of which way that foreman voted, the results of the election could not have been changed by his vote. However, without alluding to any evidence whatsoever, and without making any findings whatsoever, the Board set aside that election and ordered a new election based on its suspicion that there "may have" been "possible confusion" (R. 172). With nothing more to proceed on than this, the Court of Appeals stated that its problem was "whether it was within the administrative competence of the Board to say (that) the probability that the situation gave rise to confusion warranted the calling of a new election" (sic) (see Appendix, page 16, of this Petition). In its two-to-one decision, using such conjectural terms as "it is not unreasonable to assume", "conceivably some employees", "might have voted", "may have taken part", "might have favored", the Court authorized enforcement of the Board's Order that the employer bargain with the two labor unions involved.

While in the *Universal Camera* case, this Court said that the Board's findings were entitled to respect, and that the Board might be permitted to exercise "its informed judg-

ment on matters within its special competence", the Court also said that no order of the Board is valid unless it is supported by (1) findings, which are based upon (2) substantial evidence, as distinguished from supposition, suspicion and conjecture.

The opinion of this Court in the *Universal Camera* case has become the leading authority with regard to questions involving "substantial evidence". Cases such as *N.L.R.B. v. Russell Manufacturing Company, Inc.*, 191 F. 2d 358 (CA-5th) (1951), *Pacific Gamble Robinson Co. v. N.L.R.B.*, 186 F. 2d 106 (CA-6th) (1950), and *John F. Barnes Corp. v. N.L.R.B.*, 190 F. 2d 127 (CA-7th) (1951), clearly follow the lead of this Court in determining evidentiary matters, or those substantive matters whose determination depended upon the presence of "substantial evidence", and the decision below in this case conflicts with all of them.

Moreover, a different panel of the Circuit Court of Appeals for the District of Columbia Circuit has previously decided another case which appears to follow the *Universal Camera* doctrine, *N.L.R.B. v. Capital Transit Co.*, supra, and the dissent below shows that one member of the panel of the Court in the instant case apparently wanted to follow the *Universal Camera* doctrine but was outvoted by his two colleagues.

Based on these conflicts, then, the Supreme Court should review the decision in this case. The conflicts are not only intracircuit and intercircuit in nature, but the decision below also conflicts with an important decision of the Supreme Court.

2. *A Novel but Recurring Issue.* In the Second Election conducted by the Board in these proceedings, there were an equal number of votes case in favor of representation by the unions and against representation by them, and two

ballots were in dispute because of irregular markings which appeared upon them. The Board determined that the markings on one ballot were probably made intentionally and that the markings on the other ballot probably were inadvertently made, and that therefore the one ballot was void and the other was valid. This determination changed the result of the election.

The Court of Appeals held that the Board's ruling was supported by the evidence of the ballots themselves, thereby excluding any evidence concerning the intent of the voters. However, by ruling that the markings on the void ballot could serve to identify the voter who cast that ballot (which is contrary to the Stipulation of the parties (R. 229, III(b) through (f)), both the Court and the Board have misinterpreted and misapplied the "secret ballot" principle established by Congress in Section 9 of the National Labor Relations Act.

No Federal court has decided what the term "secret ballot" means. The Board has vacillated upon the issue many times in recent years, and has reversed itself again since its decision in the instant case. *Davison Chemical Co.*, 115 NLRB 786 (March 13, 1956). The state court cases and text authorities are hopelessly divided on the question in matters involving political elections. The question is, that assuming that a mark or initial on a ballot might conceivably identify a voter, does the term "secret" have its usual meaning that every voter shall have the right to vote in secrecy and to be free from compulsion to reveal his choice, or does it have the strained construction adopted by the Board and Court that a voter's choice may not be revealed by him in any event for any reason under any circumstances?

The Board's own decisions are in chaotic conflict. In *Ebco Mfg. Co.*, 88 NLRB 893 (1950), and *Laconia Malleable Iron*

Company, Inc., 95 NLRB 161 (1951), and in the instant case, the Board invalidated irregular ballots on the ground that the markings may have served to reveal the identity of the voters. But in *Western Electric Company, Inc.*, 97 NLRB 933 (1951), *Luntz Iron and Steel Company*, 97 NLRB 909 (1951), *Van Raalte Co.*, 49 NLRB 985 (1943), *Garod Radio Corp.*, 32 NLRB 1010 (1941), and *Davison Chemical Co.*, supra, the Board approved irregularly marked ballots on the principle that technical irregularities should not require disenfranchisement of voters and that knowledge of how an employee voted is sometimes "an unavoidable result of the challenge procedure."

Unfortunately, however, the *Davison Chemical Co.* case was decided by the Board since its decision in the instant case, so your Petitioner and its employees did not have the Board's present philosophy applied to this case.

The question raised here is one which recurs many times in the administration of the Act, as the cases cited clearly show, and this Court should review and establish the principles governing decisions involving irregular but unidentifiable ballots.

If the Supreme Court should grant the Writ of Certiorari in this case, in order to decide these questions which are of great and recurring significance in administration of the National Labor Relations Act, and of other Acts which create administrative procedures involving quasi-judicial bodies, then the Petitioner also plans to argue that the Board did not have the right to conduct its Second Election on July 23, 1954 because it had conducted an election on February 19, 1954, so that both elections had taken place within a period of approximately five months, contrary to Section 9(c)(3) of the National Labor Relations Act.

If the Writ of Certiorari is granted, the Petitioner also plans to argue that the National Labor Relations Board never should have taken jurisdiction in this case in the first instance, because the petition which was filed violated Title 18, U.S.C., Section 1001, in that the union agents falsely made oath that they had demanded recognition from the employer and that the employer had declined to recognize them, and then they admitted at the hearing that such was not the case.

Finally, your Petitioner would also argue that the practice of the Board to permit "joint bargaining agents" is in violation of the Act which provides for only one "labor organization" to represent the employees of a single bargaining unit; this practice of the Board condones the device used in this case of segregating white and Negro employees in separate unions where there is any danger that one of the two groups opposes unionization.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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December 31, 1956

APPENDIX A

Opinion of Court of Appeals

BURGER, *Circuit Judge:* The National Labor Relations Board has petitioned this court, pursuant to §10(e) of the Labor Management Relations Act,[1] for enforcement of an order directing respondent to bargain collectively with its employees' bargaining representative.

The facts, chronologically, are as follows. The Machinists Union[2] made a demand on respondent for recognition as bargaining agent for respondent's employees, then consisting of about 20 to 30 employees. Respondent's Vice President replied that he would have to consult counsel. After a lapse of six days, the union, pursuant to §9(c)(1), Labor Management Relations Act,[3] filed with the National Labor Relations Board a petition for certification of bargaining representative, reciting that a prior demand for recognition had been made on November 3, 1953 and was refused by respondent on the same day. The petition differed from the informal demand in that the petition asked for certification of the Machinists Union *and* the Teamsters Union[4] as *joint* bargaining agent for the employees, whereas the latter union had not previously requested recognition. A working agreement between the two unions for joint action to resolve jurisdictional disputes was then in effect.

The Board, after a hearing, ordered an election and included four working foremen in the "appropriate unit" making them eligible to vote. No objection to their inclusion was made by the unions or respondent. The ballot of only one of the four working foremen was actually counted by the Examiner; the union challenged one fore-

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[1] 61 Stat. 146 (1947), 29 U.S.C. §160(e) (1952).

[2] District Lodge No. 67, International Association of Machinists, AFL (Local 1486).

[3] 61 Stat. 143 (1947), 29 U.S.C. §159(c)(1) (1952).

[4] Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

man and the employer challenged two of the foremen. Excluding the challenged ballots, the election resulted in a vote of 13 for the two unions as joint bargaining agent and 15 against.

Both the unions and respondent filed objections to the election, each alleging improper conduct of the other. The Regional Director, stating that he was bound by the Board's inclusion of the working foremen in the appropriate unit, ruled that the challenged ballots should be opened. He overruled respondent's objections to union conduct but recommended that if the Board's resolution of the challenges did not render the unions' objections moot, the election be set aside because of respondent's Vice President's admitted pre-election statements to two of the working foremen, which constituted unprotected threats of reprisal to eligible employees.[5]

On review the Board concluded that it had erred in declaring the four working foremen eligible to vote, since they had supervisory and other duties rendering them ineligible to be part of the unit. The Board, holding that its own error may have caused "possible confusion," amended the unit designation to exclude working foremen, set aside the election and called for another election.

The second of the two elections resulted in designation of the two unions as joint collective bargaining agent, the vote being 12 to 11 after one "no union vote" was disqualified; the one ballot was voided on the ground that the capital letter "H" placed on the ballot in pencil was an identifying mark which violated the secrecy of the ballot.

Respondent declined to bargain with the unions and on the unions' complaint the Board ordered collective bargaining, but respondent has not complied with that order. The Board now petitions this court to enforce its order. Respondent asserts four reasons as justification for refusing to bargain:

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[5] The Vice President admitted he had told these two men they would be fired if the union won the election.

(1) The joint union petition "falsely" alleged that *both* unions had demanded and been refused bargaining rights, and there was no evidence, claimed to be essential to jurisdiction of the Board, that the Teamsters Union had been designated by a substantial number of employees.

(2) Submission to vote of two unions as a joint bargaining agent for all employees is not permitted under the statute.

(3) The Board erred in setting aside the first election, in which the majority voted "no union."

(4) The Board erred in the second election in disqualifying one "no union" ballot on which the voter placed the letter "H," there being seven employees with first or last names beginning with that letter, and in failing to disqualify a "pro-union" ballot which bore a pencil mark.

It is not essential to the Board's jurisdiction to order an election that statements on the certification petition, relating to prior demands for recognition by both unions, be accurate, or that a formal showing be made that the unions have been designated by a substantial number of employees. Rather than being jurisdictional these requirements are merely steps in the screening process by which the Board determines whether the claims of representation, prima facie, warrant the expense and effort of an election. The Board ruled that the inaccurate statements in the petition did not constitute *deliberate* falsification and that any defects were cured at the hearing. Therefore, the Board waived the defects in the petition,[6] and we believe the Board's action was within its powers. As to the showing of substantial employee interest by the petitioning unions prior to the election, there is no reason for permitting litigation of the issue by the parties;

[6] For other instances where the Board has waived defects in the petition see Padgett Printing & Lithographing Co., 101 NLRB 144, n.1; Petco Corp., 98 NLRB 150, 152; Marin County Employers Council, 87 NLRB 296, 297.

the purpose of the requirement is to make Board operations more efficient and compliance with the requirement is a matter solely for administrative determination. Respondent was not prejudiced by the alleged failure to show a substantial interest. *National Labor Relations Board v. White Construction & Engineering Co., Inc.*, 204 F. 2d 950 (5th Cir. 1953); *National Labor Relations Board v. J. I. Case Co.*, 201 F. 2d 597 (9th Cir. 1953).

While §9(c) does not specifically authorize two or more unions to file a petition for certification and be voted on as a *joint* collective bargaining agent, this procedure has been followed for many years by the Board.[7] Respondent objects that since the section refers to filing of petitions by a *labor organization* in the singular, Congress intended to exclude joint petitions. However, we agree with the Board that the phrase "labor organization" was used to refer to the *entity* alone and not to limit the number. It is fair to say that when two unions act as a joint bargaining representative they constitute a "labor organization" acting in the employees' behalf and we see no error in submitting to vote the question of a joint collective bargaining agent.

The Board rested its action in calling a new election on "possible confusion" resulting from its own error in permitting the foremen to vote. Our problem is whether it was within the administrative competence of the Board to say the probability that the situation gave rise to confusion warranted the calling of a new election. It was admitted that respondent threatened dismissal of two of the foremen if the union won the election. In a small unit of 20 to 30 employees it is not unreasonable to assume that some of the men were aware of the threats. Conceivably some employees, friendly to the foremen, might have voted against the unions in order to save

[7] Long-Bell Lumber Co., 29 NLRB 586, 597; General Motors Corp., 67 NLRB 233, 235 and cases cited; Welding Shipyards, Inc., 81 NLRB 936, 944; White Motor Co., 86 NLRB 380, 381; Swift & Co., 114 NLRB 159 and cases cited.

the foremen's jobs.[8] On the other hand, since they were included in the unit, these supervisors may have taken part in the pre-election campaign and influenced employees in a way they could not have done if they had not been so included. Moreover, some of the employees might have favored a union but not one which included foremen.

These opportunities for "possible coercion" and "confusion" resulted from the Board's erroneous action, and we believe it was not irrational or unreasonable for the Board, dealing with these close questions,[9] to conclude that the first election did not represent a free and fair expression of the employees' views. Certainly the Board is far better able than we to appraise the atmosphere surrounding an election and conclude that the situation justified setting aside the election. As this court said in *National Labor Relations Board v. Capital Transit Co.*, 95 U.S. App. D.C. 310, 311. n. 4, 221 F. 2d 864, 866, n. 4 (1955):

> " 'The propriety of the Board's determination that the election should be set aside must be considered in the light of the principle that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." ' National Labor Relations Board v. National Container Corp., 2 Cir., 1954, 211 F. 2d 525, 532, quoting from National Labor Relations Board v. A. J. Tower Co., 1946, 329 U.S. 324, 330, 67 S. Ct. 324, L. Ed. 322. See also cases there cited."

In the second election the Board disqualified a "no-union" vote because there was a capital letter "H" on the ballot, but concluded that a mark on a "pro-union"

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[8] It is immaterial whether or not the foremen's jobs were actually in danger as long as the employees thought they were.

[9] On a question like this it is of some importance that the prejudice resulting from failure to set aside the election, if in fact votes were affected by the Board's mistake, is much less than the prejudice resulting from a new election, if in fact there was no confusion or coercion.

ballot did not disqualify that vote. The mark on the disqualified ballot was clearly a capital letter "H" and the Board's decision rested on the rule that a marking which appears to have been deliberately made and which may serve to identify the voter renders the ballot void.[10] The mark on the other ballot was a faint pencil mark which respondent contends looks like a "B" or a "J." The Board ruled that this mark appeared to have no significance and seemed to be an accidental marking. Both these rulings are supported by evidence and are within the Board's discretion.

Although each of the questions decided by the Board was close, we must conclude that the Board's rulings were supported by substantial evidence and had a reasonable basis in law. The Board's order, therefore, must be enforced.

So ordered.

WILBUR K. MILLER, *Circuit Judge*, dissents.

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[10] See Greene v. Bjorseth, 183 N.E. 464, 472, 475, 350 Ill. 469 (1932); Kelly v. Brown, 141 N.E. 743, 747, 310 Ill. 319 (1923); Conley v. Hile, 193 N.E. 95, 105, 207 Ind. 488 (1934); Frothingham v. Woodside, 120 A. 906, 911, 122 Me. 525 (1923); Laconia Malleable Iron Co., Inc., 95 NLRB 161; Ebco Manufacturing Co., 88 NLRB 983; Burlington Mills, 56 NLRB 365.

APPENDIX B

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

Decision and Direction of Election

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

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[1] The Employer moves to dismiss the petition, alleging that (a) the petition contains misstatements of fact, and (b) that the record is devoid of proof that Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, herein called the Teamsters, is authorized to act for the employees herein sought. We find the motion without merit. As to (a), Item 7a of the petition, referred to by the Employer, states that on November 3, 1953, a request for recognition as bargaining representative was made and that on or about the same date the Employer refused recognition. The record otherwise shows that, before the petition was filed, the Teamsters had not requested the Employer for recognition, and that the Employer had not refused the request of District Lodge No. 67, International Association of Machinists, AFL Local 1486, for recognition. At the hearing, the Teamsters made a formal demand of the Employer for recognition, to which the Employer declined to reply. It is clear that whatever defects may have arisen in the petition were cured at the hearing without prejudice to the Employer. *Padgett Printing and Lithographing Company,* 101 NLRB 144. The record does not, in our opinion, substantiate the Employer's claim of deliberate falsification in the petition. As to (b), the Employer in substance challenges the showing of interest herein, which is a matter for administrative determination, not litigible by the parties. The hearing officer properly denied the Employer's request to produce the membership cards furnished in support of the showing of interest herein. *Sonoco Products Company,* 107 NLRB No. 24.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in maintaining, repairing, and servicing motor vehicle equipment at the Employer's automobile and truck rental establishments at 2316 Georgia Avenue, N. W., 125 Q Street, N. E., and 1709 L Street. N. W., in the District of Columbia, and at the Washington National Airport; including auto and truck mechanics, body and fender men, tiremen, washers, porters, service men, helpers, and working foremen; but excluding office employees, clerical employees. guards, watchmen, and supervisors as defined in the Act.

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Section 102.61 and 102.62 of the National Labor Relations Board's Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether (or not) they desire to

be represented, for purposes of collective bargaining, by Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and by District Lodge No. 67, International Association of Machinists, AFL (Local 1486), jointly.

Signed at Washington, D. C., January 29, 1954.

ABE MURDOCK,
Member,

IVAR H. PETERSON,
Member,

PHILIP RAY RODGERS,
Member,

NATIONAL LABOR RELATIONS BOARD.

Supplemental Decision, Order, and Second Direction of Election.

On February 19, 1954, pursuant to the Decision and Direction of Election issued by the Board in the above-entitled case,[1] an election was conducted, under the direction and supervision of the Regional Director, in the unit therein found appropriate. Following the election, the Regional Director issued and served on the parties a Tally of Ballots, which shows that, of the 31 ballots cast in the election, 13 were cast for the Petitioner, 15 were cast against the Petitioner, and 3 ballots were challenged. The challenged ballots are sufficient to affect the outcome of the election.

On February 25, 1954, and February 26, 1954, respectively, the Employer and the Petitioner filed timely objections to the conduct of the election. On April 2, 1954, after investigation, the Regional Director issued and served on the parties his Report on Objections and Challenges.

[1] Not published in the printed volumes of the Board's Decisions and Orders, 108 NLRB No. 191.

On April 9, 1954, the Employer filed exceptions to the Regional Director's report.

The Board has reviewed the objections to the election, the Regional Director's report, and the Employer's exceptions thereto. Upon the entire record in this case, the Board finds as follows:

With respect to the challenged ballots, the Employer contends that Silas Allen and Elmer Walton, two of the challenged voters, are supervisors as defined in the Act, and that the challenges to their ballots should be sustained; the Petitioner makes the same contention with respect to Charles McKeown, the third challenged voter. The Regional Director, finding that the Employer designates these voters as working foremen, a classification expressly *included* in the appropriate unit in the Board's decision, concluded that they were thus eligible to vote and recommended that their ballots be opened and counted. Thurston Morris, the fourth and only other working foreman, cast a vote without challenge.

The Board has reviewed the evidence adduced at the hearing and finds that the inclusion of working foremen in the appropriate unit was inadvertent. The working foremen are clearly supervisors as defined in the Act.[2] Under these circumstances, the Board rejects the Regional Director's recommendation respecting the challenged ballots, and amends the earlier unit finding to exclude working foremen. In view of the possible confusion that may have resulted from the Board's inadvertence in including working foremen within the unit, the Board is of the opinion that the purposes of the Act will be best served if the election here is set aside and another election is held among the employees in the amended unit.[3]

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[2] Uncontroverted evidence shows that working foremen may effectively recommend promotion, discipline, and discharge.

[3] Because we direct a new election for the reason stated, we find it unnecessary to make any findings with respect to the other issues raised on the conduct of the first election.

Accordingly, we find that all employees engaged in maintaining, repairing, and servicing motor vehicle equipment at the Employer's automobile and truck rental establishments at 2316 Georgia Avenue, N. W., 125 Q Street, N. E., and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, including auto and truck mechanics, body and fender men, tiremen, washers, porters, service men, and helpers, but excluding office employees, guards, watchmen, and working foremen and other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Order

IT IS HEREBY ORDERED that the election held on February 19, 1954, among the employees of National Truck Rental Company, Inc., Washington, D. C., be, and the same hereby is, set aside.

Second Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Second Direction of Election, under the direction and supervision of the Regional Director for the Fifth Region and subject to Sections 102.61 and 102.62 of National Labor Relations Board Rules and Regulations, among the employees in the amended appropriate unit set forth above, who were employed during the payroll period immediately preceding the date of this Second Direction of Election, including employees who did not work during said payroll period because they were ill, or on vacation, or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to rein-

statement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and by District Lodge No. 67, International Association of Machinists, AFL (Local 1486), jointly.

Dated, Washington, D. C., June 15, 1954.

GUY FARMER,
Chairman

ABE MURDOCK,
Member.

IVAR H. PETERSON,
Member.

PHILIP RAY RODGERS,
Member.

ALBERT C. BEESON,
Member.

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Second Supplemental Decision and Certification of Representatives.

On July 23, 1954, pursuant to a Supplemental Decision, Order, and Second Direction of Election issued by the Board in the above-entitled case,[1] an election was conducted under the direction and supervision of the Regional Director among employees in the amended appropriate unit. Following the election, the Regional Director issued and served upon the parties a Tally of Ballots, which shows that of the 24 ballots cost in the election 12 ballots were cast for the Petitioners, 11 ballots were cast against the Petitioners, and 1 ballot was declared void and not counted.

[1] 108 NLRB No. 191. 110 NLRB No. 120.

On July 28, 1954, the Employer filed objections to the election, in which it contended that the ballot held void, which was a "No" vote, was in fact valid, and for the first time questioned the validity of another "Yes" ballot counted as valid, alleging that it had identifying markings upon it. On August 4, 1954, after investigation, the Regional Director issued and served on the parties his Report on Objections to Second Election, finding the objections without merit. On August 12, 1954, the Employer filed exceptions to the Regional Director's report, and on August 18, 1954, the Petitioners filed a reply to the exceptions.

The Board has reviewed the Employer's objections to the election, the Regional Director's report thereon, the Employer's exceptions, and the Petitioners' reply. Upon the entire record in this case, the Board finds as follows:

The official counting of the ballots took place on July 23, 1954, immediately following the election. At no time during the counting process did either of the parties or their representatives object to the actions of the Board's election agent with respect to his ruling on the one questioned ballot held void, or his counting of the remaining ballots found valid, or otherwise. On advice from the Employer's attorney, however, the Employer's election representative declined to sign the Tally of Ballots, copies of which were duly served on the parties.

On Monday, July 26, 1954, the next working day following the election, the Employer's attorney requested, and was granted, permission to reexamine the ballots at the Regional Office, in the presence of the Regional Director.

On July 28, 1954, the Employer filed its objections, contending (a) that the "No" ballot held void by the Board's agent was in fact valid; and (b) that, in the event that this ballot, found void by the Board agent because it contained an identifying mark, were for the same reason found invalid by the Board, another counted ballot marked "Yes" must now be found invalid because it also contained an identifying mark.

We have examined the ballot found void by the Board agent and agree with his finding. We have also examined the other ballot to which the Employer's objections call attention. Member Rodgers holds that it is unnecessary to rule on the validity of this ballot, finding that, since the Employer failed to challenge, or otherwise to question the validity of any ballots at the time they were counted, the Employer's so-called objections, based solely on its subsequent and belated reexamination of the ballots, constitute a post-election challenge, and are therefore untimely.[2] Chairman Farmer and Members Peterson and Beeson disagree with the latter policy as applied to these circumstances, and would entertain an objection to both ballots and consider the merits of the objections. However, they would find that the ballot marked "yes", to which the Employer filed the belated exception, is in fact without any identifying mark, and is therefore valid. For the reasons variously stated, the Board hereby overrules the Employer's objections,[3] and certifies the Petitioners jointly as the exclusive bargaining representative of all employees in the appropriate unit.

Certification of Representatives

IT IS HEREBY CERTIFIED that Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, *and* District Lodge No. 67, International Association of Machinists, AFL (Local 1486), have been designated and selected by a majority of all employees engaged in maintaining, repairing, and servicing motor vehicle equipment at the Employer's automobile and truck rental establishments at 2316 Georgia Avenue, N. W., 125 Q. Street, N. E., and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, including auto and truck mechanics, body and

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[2] *Oppenheim Collins & Co.*, 108 NLRB 187.

[3] In view of our decision, we deem it unnecessary to consider the other contentions made with respect to the issues herein raised. The Employer's request for oral argument on its exceptions is denied, as in our opinion the record clearly set forth the positions of the parties.

fender men, tiremen, washers, porters, service men, and helpers; but excluding office employees, guards, watchmen, and working foremen and other supervisors as defined in the Act, as their joint representative for purposes of collective barganining and that, pursuant to Section 9 (a) of the Act, those organizations are the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D. C., November 9, 1954.

GUY FARMER,
Chairman.

IVAR H. PETERSON,
Member.

PHILIP RAY RODGERS,
Member.

ALBERT C. BEESON,
Member.

NATIONAL LABOR RELATIONS BOARD.

Decision and Order

Upon a charge duly filed on January 17, 1955, by Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and District Lodge No. 67, International Association of Machinists, AFL, (Local 1486), jointly, herein collectively called the Union, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for the Fifth Region, issued a complaint dated April 15, 1955, against National Truck Rental Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act. Copies of the Complaint, the Charge, and Notice of

Hearing were duly served upon the Respondent and the Union on or about April 15, 1955.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about November 17, 1954, and at all times thereafter, down to and including the issuance of the Complaint, the Respondent refused to bargain collectively with the Union as the exclusive representative of all employees in an appropriate unit, although on November 9, 1954, the Board had certified the Union as the exclusive representative of all employees in the unit for the purposes of collective bargaining,[1] and that the Union was on July 23, 1954, and has been since that date, the exclusive representative of all employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about April 22, 1955, the Respondent filed an answer admitting, among other allegations, the allegation that the Union had requested the Respondent to bargain collectively in respect to rates of pay, wages, hours of employment, and other conditions of employment, with the Union as the exclusive representative of all employees in the unit, but denying those portions of the Complaint which allege in substance that the Respondent is engaged in commerce within the meaning of the Act; that on July 23, 1954, a majority of the employees of the Respondent in the appropriate unit designated the Union as their representative for the purposes of collective bargaining with the Respondent, following a Board-ordered election; that the Union is now their exclusive representative; and that on and after November 17, 1954, the Respondent refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.

Thereafter all parties entered into a stipulation which set forth an agreed statement of facts. The stipulation

[1] See Second Supplemental Decision and Certification of Representatives, *National Truck Rental Company, Inc.*, 5-RC-1397, reported at 110 NLRB 838. 114 NLRB No. 26.

provides that the parties thereby waived their rights to a hearing and to the taking of testimony and the submission of further evidence before a Trial Examiner, the Board, or any member thereof, and to the preparation and filing of an Intermediate Report and Recommended Order, and to the making and issuance of proposed findings of fact and conclusions of law by the Board. The stipulation further provides that, upon such stipulation and the record as therein provided, the Board may issue its Decision and Order or make any disposition of this matter, which it could have made if a hearing had been held before a Trial Examiner, the Board, or any member thereof.

The aforesaid stipulation is hereby approved and accepted and made a part of the record in this case. In accordance with Section 102.45 of National Labor Relations Board Rules and Regulations — Series 6, as amended, and the order of the Board dated May 17, 1955, this proceeding was duly transferred to and continued before the Board.

Upon the basis of the aforesaid stipulation, the record and proceedings in Case No. 5-RC-1397, and the entire record in this case, the Board, having duly considered the brief filed by the Respondent, makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

The Respondent is now, and has been at all times hereinafter mentioned, a corporation, organized and existing by virtue of the laws of the State of Maryland, and having its principal office and place of business in the District of Columbia. The Respondent is now, and has been at all times material herein continuously engaged in, the business of renting passenger cars and trucks at its four establishments, at 2316 Georgia Avenue, N. W.; 125 Q Street, N. E., and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, respectively. During the calendar year 1954, the Respondent rendered

services valued in excess of $200,000 to business firms which are themselves engaged in interstate transportation by truck, or which annually ship out of the State of jurisdiction in which they are located, goods valued in excess of $50,000.

As the Respondent's operations are located in the District of Columbia, where the Board asserts jurisdiction on a plenary basis,[2] we find that the Respondent is engaged in commerce, and that it will effectuate the purposes and policies of the Act to assert jurisdiction in the instant case.

II. The Labor Organizations Involved

Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL, (Local 1486), are labor organizations as defined in Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The appropriate unit and representation by the Union of a majority therein.*

We find that all production and maintenance employees of the Respondent at its four automobile and truck rental establishments, at 2316 Georgia Avenue, N. W.; 125 Q Street, N. E.; and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, respectively, including auto and truck mechanics body and fender men, tiremen, washers, porters, service men, and helpers, but excluding office employees, clerical employees, guards, watchmen, and working foremen and other supervisors as defined in the Act, presently constitute, and have at all times since January 29, 1954, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

We also find that since July 23, 1954, on which date a majority of the employees in the appropriate unit designated the Union as the exclusive representative of all em-

[2] *M. S. Ginn & Company*, 114 NLRB No. 25.

ployees in the above unit for the purposes of collective bargaining,[3] the Union has been the exclusive representative of all employees in the unit for the purposes of collective bargaining with respect to rate of pay, wages, hours of employment, and other conditions of employment.

B. *The refusal to bargain*

The Respondent admits that on November 16, 1954, November 29, 1954, January 6, 1955, and February 1, 1955, respectively, the Union, by registered letters received by the Respondent in the normal course of mail, made four independent requests upon the Respondent to bargain collectively, with respect to rates of pay, wages, hours of employment, and other conditions of employment, with the Union as the exclusive representative of all employees in the unit, and that up to and including the date of issuance of the Complaint, the Respondent failed to reply to any of these requests. Accordingly, we find that the Respondent thereby violated Sections 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease

[3] We reject, as without merit, the contentions raised by the Respondent in its brief with respect to the validity of the instant proceeding and the representation proceeding in Case No. 5-RC-1397 and the Union's certification based thereon, contentions identical with those which we have already overruled in the representation proceeding. A review of that proceeding affirms our opinion of the correctness of those rulings. The Respondent's brief raises no new or novel issues.

and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, the Board makes the following:

Conclusions of Law

1. Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL (Local 1486), are labor organizations as defined in Section 2(5) of the Act.

2. All employees engaged in maintaining, repairing, and servicing motor vehicles equipment at the Respondent's automobile and truck rental establishments at 2316 Georgia Avenue, N. W., 125 Q Street, N. E., and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport; including auto and truck mechanics, body and fender men, tiremen, washers, porters, service men, and helpers, but excluding office employees, clerical employees, guards, watchmen, and working foremen and other supervisors as defined in the Act, presently constitute, and have at all times since July 23, 1954, constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL (Local 1486), jointly, were on July 23, 1954, and at all times thereafter have been, the exclusive representative of all employees in the aforesaid unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing on or about November 17, 1954, and at all times thereafter, to bargain collectively with Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL (Local

1486), jointly, as the exclusive representative of all employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, National Truck Rental Company, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL, (Local 1486), jointly, as the exclusive representative of all employees engaged in maintaining, repairing, and servicing motor vehicle equipment at the Respondent's automobile and truck rental establishments at 2316 Georgia Avenue, N. W.; 125 Q Street, N. E.; and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, including auto and truck mechanics, body and fender men, tiremen, washers, porters, service men, and helpers, but excluding office employees, clerical employees, guards, watchmen, and working foremen and other supervisors as defined in the Act;

(b) Interfering in any other manner with the efforts of Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, AFL, (Local 1486), jointly, to negotiate for, or to represent, the employees in the aforesaid bargaining unit as their exclusive bargaining agent.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists, (Local 1486), jointly, as the exclusive representative of all employees engaged in maintenance, repairing, and servicing motor vehicle equipment at the Respondent's automobile and truck rental establishments at 2316 Georgia Avenue, N. W.; 125 Q Street, N. E.; and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, including auto and truck mechanics, body and fender men, tiremen, washers, porters, service men and helpers; but excluding office employees, clerical employees, guards, watchmen, and working foremen and other supervisors as defined in the Act with respect to rates of pay, wages, hours, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its establishments at 2316 Georgia Avenue, N. W.; 125 Q Street, N. E.; and 1709 L Street, N. W., in the District of Columbia, and at the Washington National Airport, copies of the notice attached hereto, marked Appendix A.[4] Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

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[4] In the event this order is enforced by a decree of a Circuit Court of Appeals, there shall be inserted in the notice before the words, "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING."

(c) Notify the Regional Director for the Fifth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., September 19, 1955.

PHILIP RAY RODGERS,
Acting Chairman.

ABE MURDOCK,
Member.

IVAR H. PETERSON,
Member.

BOYD LEEDOM,
Member.

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 667

NATIONAL TRUCK RENTAL COMPANY, INC., A MARYLAND CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 13–18) is not yet reported. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding here under review (R. 127–137)[1] is reported at 114 NLRB 106. The several decisions and orders of the Board entered in the representation proceeding (R. 46–48, 63–71, 97–100), upon which the decision and order in the unfair labor practice pro-

[1] References designated "R" are to the numbers appearing at the bottom of the pages of the joint appendix.

ceeding is based in part, are reported at 108 NLRB 1349 and 110 NLRB 838.[2]

JURISDICTION

The judgment of the court below was entered on October 18, 1956. The petition for a writ of certiorari was filed on December 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board abused its discretion in setting aside an election because of the inadvertent, erroneous inclusion of supervisors in the unit found to be appropriate.

2. Whether the Board properly invalidated a ballot cast in a representation election which contained what appeared to be a deliberate identifying mark.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), are appended *infra*, pp. 12–13.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board found (R. 127–131) that petitioner violated Section 8 (a) (5) and (1) of the National Labor Relations Act, as amended, by its admitted refusal to

[2] The original decision and direction of election in the representation proceeding (R. 46–48) is not published in the printed volumes of the Board's Decisions and Orders.

bargain collectively with two unions[3] which had been certified by the Board, following two Board-conducted elections, as the joint bargaining representative of petitioner's employees in an appropriate bargaining unit. In defense of its refusal to bargain, petitioner challenged the validity of the Board's "Certification of Representatives" in the underlying representation proceeding, contending principally that (1) the Board erred in setting aside the first election and directing another election and (2) the Board further erred in finding that a majority of the employees voted for union representation in the second election. The pertinent facts with respect to these defenses, which the Board rejected, are as follows:

A. *The first election.*—In November 1953 the Unions, pursuant to Section 9 (c) (1) of the Act, filed a petition with the Board to determine the wishes of petitioner's repair and maintenance employees as to a bargaining representative (R. 46; 37). Following a hearing on the representation petition, the Board directed that an election be held in the bargaining unit requested by the Unions (R. 46–48; 37).[4] Although the unit approved by the Board included four work-

[3] Local 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and District Lodge No. 67, International Association of Machinists (Local 1486).

[4] The Board denied as without merit the employer's motion to dismiss the petition on the asserted grounds (1) that it contained misstatements of fact, (2) that the record was devoid of proof that the Teamsters Union had been authorized to act for any of the employees, and (3) that the statute did not permit a representation petition to be filed by two unions (R. 46, n. 1; 5–10).

ing foremen, no objection to their inclusion was made by the Unions or petitioner (R. 47; 19, 20). The election held on February 19, 1954, resulted in 13 votes for the Unions as joint representative, 15 against them, and 3 challenged ballots (R. 51–52).

Both petitioner and the Unions filed objections to the election (R. 68; 53–56). On April 2, 1954, the Regional Director, after investigation, issued a Report on Objections and Challenges (R. 68; 57–64). With respect to the challenges, he reported that the ballots of three of the working foremen had been challenged by petitioner and the Unions, each alleging that those employees were supervisors. He also reported that still another working foreman had been permitted to vote unchallenged. However, since the Board had specifically included working foremen in the appropriate unit, he recommended that the three challenged ballots be opened and counted (R. 58). With respect to petitioner's objections to the election, the Regional Director reported that petitioner was unable to adduce any supporting evidence and therefore recommended that such objections be overruled (R. 59, 63). Finding merit in the Unions' objections insofar as they were based on admitted pre-election threats by petitioner's vice-president that two of the working foremen would be discharged for union activity if the Unions won the election, the Regional Director further recommended that the election be set aside for this reason unless the Board's resolution of the challenged ballots rendered the Unions' objections moot (R. 59, 60, 63).

On June 15, 1954, the Board, after reviewing evidence adduced at the initial hearing which showed that all four working foremen could effectively recommend promotion, discipline, and discharge (R. 20–21, 22, 24–25), found that they were clearly supervisors as defined in the Act and that their inclusion in the appropriate unit was inadvertent (R. 68–69). It accordingly rejected the Regional Director's recommendation as to the challenged ballots, and amended the earlier unit finding to exclude working foremen. It held that in "view of the possible confusion that may have resulted from the Board's inadvertence in including working foremen within the unit," the purposes of the Act would best be served by setting aside the election and directing another election among the employees in the amended unit (R. 69). Under the circumstances, the Board found it unnecessary to make any findings with respect to the other issues raised on the conduct of the election (R. 69, n. 3).

B. *The second election.*—Immediately following the second election conducted on July 23, 1954, the ballots were opened and officially counted (R. 97, 98; 113). Out of 24 ballots cast, 12 were for the Unions, 11 were against them, and 1 ballot was ruled void by the Board's agent and not counted because a capital letter "H" was written beside the "No" box, which was marked X (R. 97; 75, 88). Although petitioner raised no objection during the count to the ballots found valid, its attorney examined the ballots on the next working day after the official count and discovered

a previously unnoticed pencil mark on one of the "Yes" ballots (R. 98; 113–114, 87). Thereafter, on July 28, petitioner filed objections to the second election, contending that the void "No" ballot was in fact valid; but that if the Board should uphold its agent's ruling with respect to this ballot, then the Board should also invalidate the "Yes" ballot with the pencil mark (R. 98; 80).

On August 4, 1954, the Regional Director, after investigation, issued his report on petitioner's objections to the second election (R. 83–88). He reported that upon opening the ballots for counting and tabulation, the Board agent discovered one ballot (R. 88) with an X plainly marked in the "No" box but, in addition, with another penciled mark just to the left of the "No" box which appeared to be a capital "H" and further appeared to be a deliberate marking, not accidental or inadvertent. He ruled that the Board agent had properly voided this ballot because it contained what appeared to be a deliberate identifying mark (R. 85). The Regional Director further reported that on the next working day after the election, petitioner's counsel questioned another ballot (R. 87) which was plainly marked with an X in the "Yes" box and which, on close scrutiny, revealed in the margin near the bottom edge of the ballot a faint pencil mark which was not noticed at the time the ballots were counted.[5] He reported that this faint

[5] Because of the faintness of the mark on this ballot, it is almost invisible on the reproduced copy appearing in the joint appendix (R. 87). A heavy straight line appearing above the "No" box on the reproduced copy is a stamp mark later placed upon the ballot and is not the mark in issue.

mark was distinguishable from the marking on the "No" ballot in that it had no clear resemblance to any letter, figure, or other identifying characteristic but instead had the appearance of being an accidental or inadvertent marking.[6] He therefore ruled that the "Yes" ballot should not be invalidated (R. 85–86).

Following petitioner's exceptions to the Regional Director's report (R. 89–94), the Board on November 9 issued its Second Supplemental Decision and Certification of Representatives (R. 97–100). After examination of the two ballots in question, the Board agreed with the Regional Director's rulings with respect to both ballots. Accordingly, since the Unions had received a majority of the valid votes cast in the second election, the Board certified the Unions as the joint bargaining representative of petitioner's repair and maintenance employees (R. 99–100).

C. *The unfair labor practice proceeding.*—Following the issuance of the Board's certification petitioner refused to honor it. In the ensuing unfair labor practice proceeding the parties entered into a stipulation waiving a hearing before a trial examiner and setting forth an agreed statement of facts which provided, *inter alia,* with respect to the second election (R. 128–129; 114):

> There is no evidence other than the ballots themselves and the inferences which may reasonably be drawn therefrom as to the identity

[6] Petitioner had contended that the mark resembled a "B" or a "J" (R. 85, 80).

> of the voters who cast either ballot, or that either ballot was deliberately marked for identification purposes.

The Board, on September 19, 1955, issued a decision and order, reaffirming its rulings in the representation proceeding and finding that petitioner had refused to bargain with the Unions in violation of Section 8 (a) (5) and (1) of the Act (R. 127–137).

II. THE BOARD'S ORDER

The Board's order requires petitioner to cease and desist from refusing to bargain collectively with the Unions, jointly, as the representative of its employees and from in any manner interfering with the efforts of the Unions to represent the employees (R. 133–134). Affirmatively, the order requires petitioner to bargain collectively with the Unions upon request and to post appropriate notices (R. 134–135).

III. THE DECISION OF THE COURT BELOW

The court below (Miller, J., dissenting without opinion) (Pet. App. 13–18) sustained the findings and order of the Board. In relevant part the court held that the Board's decision to set aside the first election because of its inadvertent error in permitting foremen to vote was a reasonable exercise of the Board's "'wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees'" (Pet. App. 16–17). The court found that the opportunities for "possible coercion" and "confusion" resulting from the error warranted

the Board's conclusion that "the first election did not represent a free and fair expression of the employees' views" (Pet. App. 17). The court further held that the Board's rulings with respect to the challenged ballots in the second election were "supported by evidence" and "within the Board's discretion" (Pet. App. 17–18). Finally, the court rejected as without merit petitioner's additional contentions that the Board lacks authority to entertain a representation petition containing inaccurate statements or to certify two unions as a joint collective bargaining representative (Pet. App. 15–16).

ARGUMENT

Petitioner's challenges (Pet. 7–11) to the propriety of the Board's decision setting aside the representation election because of the inadvertent inclusion of supervisors in the unit found to be appropriate and its ruling voiding the ballot containing the identifying mark raise no question warranting certiorari. It is settled that Congress has entrusted the Board with "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226. The Board's conclusion that the first election here was invalid because of the possible confusion and prejudicial effect arising from its own undisputed error in including supervisors in the voting unit, was—as the court below found (Pet. App.

16–17)—reasonable and clearly within the allowable limits of discretion. The Board's ruling in this respect presents no evidentiary question, and petitioner's claim of conflict (Pet. 7, 9) with *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, and other substantial evidence cases is without basis. The Board's ruling on the marked ballots in the second election was likewise a reasonable exercise of its discretion, for the Board merely applied the rule—generally followed in political elections[7]—that a marking which appears to have been deliberately made and which may serve to identify the voter renders the ballot void. *National Labor Relations Board* v. *Whitinsville Spinning Ring Co.,* 199 F. 2d 585, 587–588 (C. A. 1); Cf. *A. J. Tower, supra,* pp. 331–332. Petitioner's contention (Pet. 10) that the "secret ballot" specified by Section 9 does not require invalidation of irregularly marked ballots which "might conceivably identify a voter," is no more than an assertion that the Board might have adopted, with equal propriety, a different rule.[8]

[7] See, e. g., *Greene* v. *Bjorseth,* 183 N. E. 464, 472, 475, 350 Ill. 469; *Kelly* v. *Brown,* 141 N. E. 743, 747, 310 Ill. 319; *Conley* v. *Hile,* 193 N. E. 95, 105, 207 Ind. 488, *Frothingham* v. *Woodside,* 120 A. 906, 911, 122 Me. 525.

[8] That the Board in other cases cited by petitioner (Pet. 11) has under differing facts and circumstances found irregularly marked ballots valid because in its judgment the marking did not constitute a deliberate attempt at voter identification or because the identity of a voter was unavoidably revealed as a result of the challenge procedure, does not detract from the reasonableness of its rulings in the instant case or warrant further review by this Court.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining

representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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